



Decision

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Matter of: Futron, Inc.

File: B-420703

Date: July 25, 2022

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Colonel Frank Yoon, Major Alissa J. Schrider, Edward S. Fisher, Esq., and Major Jacquelyn C. Fiorello, Department of the Air Force, for the agency.
Heather Self, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably rejected protester's proposal for failing to attach certain completed representations with its cover letter where the solicitation warned offerors that failure to submit them would result in the proposal being deemed ineligible for award.
 2. Protest alleging that the agency was required to refer the firm's eligibility for award to the U.S. Small Business Administration for a certificate of competency determination is denied where the agency rejected the protester's proposal for failure to submit required information, which did not constitute a responsibility-type determination.
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DECISION

Futron, Inc., a small business of Woodbridge, Virginia, protests the rejection of its proposal under task order request for proposals (RFP) No. FA2396-22-F-0174, issued by the Department of the Air Force for aerospace structures experimental support services. The protester argues that the agency unreasonably found the firm's proposal non-compliant with the solicitation's instructions. The protester also contends that the agency was required to make a referral to the U.S. Small Business Administration (SBA) for a certificate of competency (COC) determination before rejecting Futron's proposal.

We deny the protest.

BACKGROUND

On January 24, 2022, using the procedures of Federal Acquisition Regulation (FAR) subpart 16.5, the agency issued the RFP to small business holders of General Services Administration (GSA) One Acquisition Solution for Integrated Services (OASIS) indefinite-delivery, indefinite-quantity (IDIQ) contracts. Agency Report (AR), Tab 6, RFP Amend. 2 at 1.¹ The agency sought proposals for a contractor to provide personnel, equipment, materials, and services in support of the Air Force Research Laboratory, Aerospace Systems Directorate, Aerospace Vehicles Division, Structural Validation Branch (AFRL/RQVV). AR, Tab 4, Initial RFP at 12. The AFRL/RQVV “plans, manages, and conducts experimental activities to validate advanced structural designs and simulations to improve aerospace vehicle performance,” and “provides dynamic, thermal, and mechanical experiments to satisfy the requirements of Aerospace Vehicles Division researchers” as well as customers from other parts of the Air Force, Department of Defense, “other agencies, industry, and academia.” *Id.*

The solicitation contemplated issuance of a hybrid fixed-price and cost-plus-fixed-fee task order with a 1-year base period and four 1-year option periods. AR, Tab 6, RFP Amend. 2 at 1, 4. The solicitation provided for award to be made on a best-value tradeoff basis considering technical and price evaluation factors, with the technical factor being more important than price. *Id.* at 1, 5-6. The solicitation provided that the agency would evaluate “all proposals that are in compliance with the criteria set forth in Table 1 of” the solicitation. *Id.* at 5. Table 1 established the three proposal sections offerors were required to submit--cover letter, technical proposal, and price proposal--as well as the page limitations and content requirements for each section. *Id.* at 3-4. Additionally, the solicitation provided that proposals should be “all-inclusive and not refer or require the government to external communication mediums to supplement the proposal.” *Id.* at 3. The solicitation further established that, for task order award, the agency would select a proposal that conformed to the solicitation requirements, including “all stated terms, conditions, representations, certifications, and all other information required by the submission instructions.” *Id.* at 1-2.

As relevant here, in addition to the requirements set forth in Table 1, the solicitation included the following specific submission instruction:

Offerors must complete the representation fill-in at FAR 52.204-24(d), Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, and 52.204-26(c), Covered Telecommunications Equipment or Services. *Both provisions must be completed and attached to the Cover Letter.* The provisions attached to the Cover Letter will not count toward the one-page limit in Table 1. Failure to complete the representations will deem the proposal ineligible for award.

¹ Citations to the record use the Adobe PDF pagination of documents submitted by the parties.

AR, Tab 6, RFP Amend. 2 at 2 (emphasis added).

Additionally, the solicitation included attachment 5, which comprised various solicitation elements, such as a Standard Form 1449, a schedule of supplies or services, a delivery or performance schedule, contract administration data, multiple lists of FAR clauses and provisions incorporated by reference, numerous FAR clauses and provisions incorporated by full text, and, as most relevant here, a list of “Representations, Certifications, & Other Statements.” AR, Tab 6, RFP Amend. 2 at 24-88, *see specifically* 73-82. Attachment 5 incorporated the full text of FAR provision 52.204-24--one of the two representations the solicitation required offerors to complete and attach to the proposal cover letters. *Id.* at 76. Attachment 5, however, did not include the full text of FAR provision 52.204-26--the second of the two representations the solicitation required offerors to complete and attach to their cover letters. *See id. generally.*

Rather, attachment 5 included FAR provision 52.204-8, Annual Representations and Certifications, which provided a list of representations or certifications in the System for Award Management (SAM) that were applicable to this solicitation; that list included FAR provision 52.204-26.² AR, Tab 6, RFP Amend. 2 at 73-74. Additionally, FAR provision 52.204-8 sets forth that if, as was the case here, the solicitation included FAR provision 52.204-7, System for Award Management, the offeror could choose to complete the representations and certifications listed in FAR provision 52.204-8 electronically in SAM and, by submission of its offer, verify that the electronic representations and certifications were “current, accurate, complete, and applicable to this solicitation.” *Id.* at 73, 75.

The agency received eight timely proposals, including the one submitted by Futron. AR, Tab 12, Comparative Analysis and Decision Document (CADD) at 1-2. Upon receipt of proposals, the agency first assessed whether each proposal was submitted in accordance with the solicitation instructions, and found that five of the eight proposals were not. *Id.* at 1-2. Futron’s proposal was one of these five proposals, and all five were “removed from the competition based on non-compliances with the [RFP].” *Id.* at 1. The agency deemed Futron’s proposal non-compliant because the firm “did not complete the representation fill in at FAR 52.204-26(c), Covered Telecommunications Equipment or Services, and attach the completed provision to the cover letter.” *Id.* at 2.

The agency evaluated the three remaining compliant proposals, and based on the evaluation, selected, for task order award, the proposal submitted by Advanced Concepts Enterprises, Inc., at a price of \$31,741,635.³ AR, Tab 12, CADD at 10;

² SAM is accessible at <https://sam.gov> (last visited July 15, 2022).

³ As noted above, the task order RFP here was issued by the Air Force under the OASIS IDIQ contracts established by GSA. For purposes of determining the applicable dollar value threshold for our Office’s jurisdiction to hear protests in connection with the issuance or proposed issuance of a task or delivery order, we analyze the statutory authority (*i.e.*, Title 10 or Title 41 of the United States Code) under which the IDIQ

Tab 13, Unsuccessful Offeror Notice at 1. Following receipt of a debriefing, Futron filed this protest with our Office. AR, Tab 16, Debriefing.

DISCUSSION

Futron maintains that the agency's rejection of the firm's proposal "was based on erroneous factual premises" because the firm did, in fact, submit the representations required by FAR 52.204-26(c). Protest at 16. Additionally, Futron argues that the agency was prohibited from eliminating the firm's proposal from consideration for award without first referring the matter to the SBA for a COC determination. Comments & Supp. Protest at 46-54. Futron raises additional ancillary protest arguments. While we do not address every argument raised, we have considered all of the protest allegations and conclude that none provides a basis to sustain the protest.

Attachment of Representations

As an initial matter, we note that in reviewing an agency's rejection of a proposal as noncompliant, our Office will examine the record to determine whether the agency's decision was reasonable and in accordance with the solicitation criteria and applicable statutes and regulations. *Global Dimensions, LLC*, B-419672, May 12, 2021, 2021 CPD ¶ 203 at 3.

The solicitation here required submission of two completed representations--found in the body of FAR provisions 52.204-24 and 52.204-26--and established that these completed representations were to be "attached" to an offeror's cover letter. AR, Tab 6, RFP Amend. 2 at 2. The record reflects that Futron submitted a completed solicitation attachment 5 with its cover letter. AR, Tab 9, Futron's Cover Letter at 2-65. As discussed above, attachment 5 incorporated, by full text, FAR provision 52.204-24, and the record shows that Futron completed the required representations in paragraph (d) of that provision. *Id.* at 53. Relevant here, attachment 5 also included FAR provision 52.204-8, which provided that offerors may complete various representations and certifications, including the required representations of FAR provision 52.204-26, electronically through SAM. The record demonstrates that Futron elected to complete the representations and certifications listed in FAR provision 52.204-8, electronically in SAM. *Id.* at 50.

contract was established, rather than the authority of the agency which issued the task or delivery order. *Analytic Strategies LLC; Gemini Indus., Inc.*, B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 2 n.2. The GSA OASIS IDIQ contracts were established under the authority of Title 41, and thus the jurisdictional dollar threshold applicable here is \$10 million. 41 U.S.C. § 4106(f)(1)(B). The value of the protested task order exceeds this amount, and, as such, this protest is within our jurisdiction to hear protests of task orders placed under civilian agency IDIQ contracts. *Id.*

Futron argues that its submission of a completed attachment 5, combined with its completion of representations and certifications electronically in SAM, constitutes compliance with the solicitation's instruction requiring that the representations in FAR provision 52.204-26 be "attached" to an offeror's cover letter. Protest at 16-18. Specifically, Futron contends that the solicitation did not specify "that to be considered 'attached,' the actual verbiage of FAR 52.204-26(c)(1) or (2) had to be repeated in an offeror's cover letter." *Id.* at 18. Futron represents that the definition of the word "attach" is broader than simply meaning to "fasten, secure, or join" something, and also encompasses concepts such as incorporation by reference. *Id.* Futron maintains that the solicitation "did not delimit the method, means, or manner by which any representations in FAR 52.204-26(c) had to be 'attached'," and that the inclusion of FAR provision 52.204-8 in solicitation attachment 5, which Futron appended to its cover letter, "allowed Futron to incorporate the representations of that FAR provision [52.204-26] by reference into its Proposal." *Id.* at 19.

The representations included in FAR provisions 52.204-24 and 52.204-26 stem from section 889 of the John S. McCain National Defense Authorization Act for fiscal year 2019, Pub. L. No. 115-232, § 889 (codified at 41 U.S.C. subtitle I, div. C, ch. 39, Statutory Notes and Related Subsidiaries). Section 889 prohibits federal agencies from contracting for any equipment, systems, or services that use certain telecommunications equipment or services as a substantial or essential component. *Id.* § 889(a)(1)(A). Section 889 also prohibits federal agencies from contracting with an entity that uses such telecommunications equipment or services as a substantial or essential component of any of the entity's systems, or as critical technology as part of any of the entity's systems. *Id.* § 889(a)(1)(B).

The agency explains that it required offerors to attach the representations of FAR provisions 52.204-24 and 52.204-26 to their cover letters "because the Government determined that it [was] necessary to know--from the face of the proposal, not from performing outside research or waiting until the final SAM.gov check--whether the offeror will provide or use covered technology equipment or services in the performance of this contract." AR, Tab 1, Contracting Officer's Statement (COS) at 11-12. The agency made this determination because the successful contractor under this solicitation "will be involved in critical Air Force research projects and the Government need[ed] to know at the outset [of proposal review] whether the offerors pose[d] any potential security risk." *Id.* at 12.

The agency contends that even if, assuming for the sake of argument, Futron's use of attachment 5 and attendant completion in SAM of the representations in FAR provision 52.204-26 could be considered attachment of the required representation to the firm's cover letter, Futron's proposal was still non-compliant. COS at 13. Specifically, the agency argues that Futron's reliance on incorporation by reference of the representation required by FAR 52.204-26 "referred the Government to an external communication medium, SAM.gov, to determine how or whether Futron actually completed the representations." *Id.* The agency maintains that the solicitation prohibited the type of incorporation by reference that Futron attempts to rely on. According to the agency, the

submission instructions “expressly warned offerors not to ‘refer or require the government to external communication mediums to supplement the proposal’.” *Id.* at 13-14.

For its part, Futron argues that the agency’s attempt to limit offerors’ use of SAM to complete the representations in FAR provision 52.204-26 contravenes the FAR. Specifically, for solicitations that include FAR provision 52.204-7, such as the one here, the protester argues contracting officers should not separately include the FAR-based representations already encompassed in provision 52.204-8. Protest at 20, *citing* FAR 4.1202(a) (“When the provision at 52.204-7, System for Award Management, is included in the solicitation, do not separately include the following representations and certifications . . . (8) 52.204-26, Covered Telecommunications Equipment or Services--Representation”).

In sum, Futron and the agency disagree over what the solicitation required when it instructed offerors that the representations included in FAR provisions 52.204-24 and 52.204-26 must be “attached” to their cover letters lest their proposals be deemed ineligible for award. When a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. *Patronus Systems, Inc.*, B-418784, B-418784.2, Sept. 3, 2020, 2020 CPD ¶ 291 at 5. To be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Id.*; *Planned Systems International, Inc.*, B-413028.5, Feb. 21, 2018, 2018 CPD ¶ 126 at 6.

Here, the interpretation of the solicitation advanced by Futron is unreasonable because it fails to take into account all the solicitation language. Specifically, Futron’s interpretation that it could comply with the solicitation’s proposal submission instructions by completing solicitation attachment 5 and attendant representations and certifications in SAM renders superfluous the solicitation’s separate instruction that two specific representations be “attached” to an offeror’s cover letter. Futron’s interpretation also ignores the solicitation’s instruction that proposals should be complete on their own and should not rely on reference to external sources of information. Accordingly, we find unpersuasive Futron’s interpretation of the solicitation. See *e.g.*, *Crew Training Int’l, Inc.*, B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4 (a reading of a solicitation that is inconsistent with other solicitation provisions, and renders some parts of the document extraneous or meaningless cannot be a reasonable reading).

Reading the solicitation’s various submission instructions as a whole, it is clear that the requirement for offerors to attach to their cover letters the representations of FAR provisions 52.204-24 and 52.204-26 was a separate, additional requirement beyond the normal representations and certifications requirements set forth in solicitation

attachment 5.⁴ The record reflects that Futron’s proposal failed to comply with this requirement. Accordingly, we deny Futron’s challenge to the rejection of its proposal. See e.g. *QED Systems, LLC*, B-419441.4, Jan. 28, 2022, 2022 CPD ¶ 38 at 6 (denying protest challenging rejection of cost proposal that was not properly sanitized in contravention of the solicitation’s requirements); *Unico Mech. Corp.*, B-419250, Oct. 29, 2020, 2020 CPD ¶ 337 at 6 (denying protest challenging application of solicitation’s page limitation to offeror’s proposal where offeror’s interpretation of the page limitation language was unreasonable).

Moreover, to the extent that Futron considered the solicitation’s inclusion of a special requirement specific to the representations of FAR provision 52.204-26 to be at odds with applicable procurement regulations, or otherwise improper, Futron was required to raise the matter prior to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1); see e.g., *Ashlin Mgmt. Group*, B-419472.3, B-419472.4, Nov. 4, 2021, 2021 CPD ¶ 357 at 8-9 n.8 (dismissing as untimely protester’s argument that the solicitation failed to include a required FAR provision, notwithstanding the protester’s representation that it assumed the agency obtained a FAR deviation because “agencies are presumed to act in good faith, and it did not anticipate that the agency was choosing not to amend the solicitation in willful violation of the FAR”); *Trade West Constr., Inc.*, B-418252, Dec. 10, 2019, 2019 CPD ¶ 421 at 6 (dismissing as untimely protester’s argument that a qualification requirement included in the solicitation violated an applicable statute, notwithstanding the protester’s representation that it “did not reasonably anticipate that the Agency was adopting a requirement clearly in violation of [statute]”). Here, having waited to raise this matter until after the time set for receipt of revised proposals and after award, the protest argument arising from the alleged solicitation impropriety is untimely, and therefore dismissed.

⁴ To the extent that Futron’s alternative interpretation of the term “attached” might be considered reasonable, this would have created an ambiguity within the solicitation, because there would have been two or more reasonable interpretations stemming from the solicitation’s inclusion of two distinct requirements related to the representations of FAR provision 52.204-26. See *Trailboss Enters., Inc.*, B-419209, Dec. 23, 2020, 2020 CPD ¶ 414 at 7-8. Further, the ambiguity here was obvious or apparent from the face of the RFP, and thus was a patent ambiguity. *Colt Def., LLC*, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8 (noting that if the error in the solicitation is obvious, gross, or glaring then the ambiguity is patent). To be considered timely, a patent ambiguity must be protested prior to the closing date for the submission of proposals. 4 C.F.R. § 21.2(a)(1); *Crew Training Int’l, Inc.*, *supra* at 4 n.9. The purpose of our timeliness rules in this regard is to afford the parties an opportunity to resolve ambiguities prior to the submission of offers, so that such patently ambiguous provisions can be remedied before offeror’s formulate their proposals. *Pitney Bowes, Inc.*, B-294868, B-294868.2, Jan. 4, 2005, 2005 CPD ¶ 10 at 5. Where, as here, a patent ambiguity is not challenged prior to submission of offers, we will dismiss as untimely any subsequent protest assertion that is based on one of the alternative interpretations. *Id.*

Referral to SBA

Next, Futron contends that the agency's rejection of Futron's proposal for failure to comply with the instructions was improper because the agency failed to refer the matter, which concerns Futron's responsibility, to SBA for a COC determination. Comments & Supp. Protest at 46-47. In support of its argument, Futron points to the agency's explanation that "the Government required this information [the completed representations attached to an offeror's cover letter] in order to properly evaluate the quality and delivery of the services being provided on this task order, specifically *whether Futron intends* to provide or use covered telecommunications equipment or services in the provision of these services." *Id.* at 48, *citing* AR, Tab 2, Memorandum of Law (MOL) at 25-26.

The protester further points to the agency's assertion that Futron's failure to comply with the solicitation's proposal submission instructions resulted in Futron's proposal not providing "the Government with sufficient information to understand [*Futron's intention* regarding the provision or use of covered telecommunications equipment and services." Comments & Supp. Protest at 48, *citing* COS at 14. Futron maintains that "[t]hese and other statements" in the COS and MOL show that the agency's real concern was ensuring it had all relevant information to fully protect it from "any risk of a security breach associated with covered telecommunications equipment and services' rather than any concerns about Futron's stated intent to comply with the substantive requirements." Comments & Supp. Protest at 48. Futron argues that such concerns related to an offeror's "intentions" involve matters of responsibility. *Id.* at 49. Thus, according to Futron, the agency was obligated to refer the matter to the SBA for a COC determination, "instead of summarily rejecting Futron's Proposal." *Id.* at 51.

The agency responds that it did not find Futron to be non-responsible, but rather rejected Futron's proposal because of the firm's failure to comply with the solicitation's proposal submission instructions. AR, Tab 19, Supp. COS/MOL at 13. The agency maintains that Futron's failure resulted in a lack of information necessary for the agency to conduct the required analysis related to an offeror's representations under FAR provisions 52.204-24 and 52.204-26. *Id.* at 12. Thus, the agency argues, "[t]his failure concerned the acceptability of the proposal, not Futron's responsibility." *Id.* at 13.

Under the SBA's COC program, agencies must refer a determination that a small business is not responsible to the SBA, if that determination would preclude the small business from receiving award.⁵ 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; FAR subpart 19.6; *Specialty Marine, Inc.*, B-292053, May 19, 2003, 2003 CPD ¶ 106 at 2.

On the record here, we do not agree with the protester's contention that the agency's rejection of Futron's proposal involved a determination of the protester's responsibility that required referral to the SBA. Rather, the record reflects that the agency's

⁵ A COC is the certificate issued by the SBA stating that the holder is responsible for the purpose of receiving and performing a specific government contract. FAR 19.601(a).

elimination of Futron's proposal from further consideration for award was based on the firm's failure to submit required information in the format prescribed by the solicitation, which the solicitation cautioned would result in an offeror's proposal being deemed ineligible for award. When, as here, an agency finds a proposal to be unacceptable based on an offeror's failure to submit required information the finding does not constitute a determination that the offeror is not a responsible prospective contractor. *MicroTechnologies, LLC*, B-414670, B-414670.2, Aug. 1, 2017, 2017 CPD ¶ 236 at 6; *see also Facility Servs. Mgmt., Inc.--Adv. Op.*, B-414857.9, Aug. 23, 2018, 2019 CPD ¶ 35 at 8-9 n.12 (“[W]here a proposal is found technically unacceptable because of a failure to include required information, that finding does not constitute a responsibility-type determination necessitating a referral, even if the evaluation factor in question is arguably responsibility-related.”). Accordingly, we find no merit to this argument, and the allegation is denied.

The protest is denied.

Edda Emmanuelli Perez
General Counsel